



THE CHILD'S RIGHTS ARE PARAMOUNT

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Children have the right to grow up whole and sane. Parents, on the other hand, have both the responsibility and the right to raise their "own" children. At what point do these two sets of rights conflict? Whose rights have precedence?

The 1997 Adoption and Safe Families Act (ASFA) makes clear the primary status of the child's rights: "The child's health and safety shall be the paramount concern." [Sec. 101(a)]

Rights are based upon needs. We all have the right to what we need, and basic needs take precedence over more sophisticated ones. By identifying "health and safety" needs, ASFA is specifying that the child's basic needs supersede the less basic needs of the parent to raise a child.

Human beings have a hierarchy of needs, according to Maslow (1968), with needs for food and warmth, health and safety, taking precedence over higher level needs of belongingness, power, and self-actualization. The child's needs for health and safety, related to sanity and life itself, have priority over the parent's needs for belongingness, control, and fulfillment in caring for a child as he grows. The more basic the need, the more dominant the right.

THE RIGHTS OF THE PARENTS

No one disputes that the rights of the birth parents are pre-eminent, so long as they do not threaten the child's right to life and limb. Until recently, the fact of procreation gave the parent almost total control, even to the point of abuse and neglect. The law, however, has veered away from that extreme position. Parents do not own a child. Parents' rights are contingent upon their providing the minimum necessary for life and growth.

While not absolute, parental rights over the welfare of their child are extensive. Parents' rights must be honored and protected in order for the parents to fulfill their responsibility, to raise the children they have procreated all the way to adulthood and self-sufficiency.

Children should not be removed from the parental home for anything less than a serious danger to life and health that cannot be quickly remedied. The reason for this caveat is that the removal itself is serious. Too often, caseworkers fail to appreciate the positive aspects of nurture and caring and the attachment between child and parents in an otherwise dysfunctional home. The child is removed "just to be on the safe side." Unfortunately, when removal is being considered, there is no safe side.

Caseworkers may also be unaware of the harm that results from disrupting bonds. The disruption of a bonded relationship can shape a child's future ability to attach and may result in serious adult disorders. The correlations between foster care and adult mental illness, crime, poverty, and homelessness are high.

If a child must be removed from the parental home, work toward reunification should begin immediately. Since the reasons for removal are obvious and clear, a Family Reunification Plan (FRP) can and should be developed within an hour. The parents can be informed immediately what must be done to get their child back. Parent training? Change of residence? Medical treatment? Drug screen? AA? Getting a job? Whatever it takes, the birth family has the right to know the specifics at once so they can begin work toward reunification.

Of course the FRP will need to be "baptized" or even altered by the later case plan and the court. The initial informal plan must be made formal. Waiting for the formal plan before reunification efforts begin, however, results in an unnecessary delay which serves the best interests of no one. The quicker everyone can begin, the quicker the child may be reunified with his family. Or if that is not likely to happen "within child time," the more quickly another permanency plan can be developed.

THE RIGHTS OF THE STATE: WHEN TO INTERVENE

The state has the right and duty to protect the child from life-threatening harm. The state may exercise this right through the welfare and legal systems by overriding the rights of the legal parents. The exercise of this right begins with the investigation by Child Protection Services (CPS) of a complaint of neglect or abuse. This investigation should begin promptly and be as thorough as is possible, and the abuse should be determined as substantiated or unsubstantiated within 24 hours. A complaint of child abuse is an emergency and must be handled immediately as is done in a medical Emergency Room.

While either the decision to remove the child or to allow the child to remain with in-home protection may lead to dire results, a choice must be made. Either option may have serious consequences, but delay is certainly a mistake. Although quick decisions may need later review, emergencies require immediate choices.

Both removing the child and leaving the child where he is can have dangerous consequences. There is no "safe" answer or response. The only way to get a wise decision within 24 hours is to gather all the information possible, to investigate thoroughly, and to consult with colleagues or supervisors. Then make the choice and state the reason. The child may or may not be removed from the parental home at that time, depending on the child protection worker's judgment as to how serious the neglect/abuse is and whether it will continue.

Whatever the decision, the state's responsibility to protect the child continues. The state may take temporary wardship whether the child remains in the home or is removed. If the child remains in the home, the state must see and monitor that the parents take appropriate steps to improve the situation. If the child is placed outside the home, the state must do its utmost to protect the child from the state's own bureaucracy which frequently leads to delay, unnecessarily long separations, foster care drift, and harm. By delaying, the state itself, through its welfare and court systems, is guilty of child abuse.

Too often in the past the state has given the legal parents the benefit of the doubt. The parents have been granted opportunity after opportunity over a long period of time to correct their own shortcomings. The courts have bent over backwards to give the legal parents multiple chances to redeem themselves. And the child pays a heavy price. In a misplaced effort to be fair, the child's rights are subordinated and diminished. Time is the enemy of the child.

THE RIGHTS OF THE CHILD

As society's most vulnerable citizens, foster children have a primary claim on our collective conscience. To develop normally, all children, and especially those who have suffered abuse and displacement, have certain essential needs. These needs lead to rights which come before all others. The right to a proper development clearly gives the child precedence.

The parents, for better or worse, have already reached a stage in life where patterns are set. Not so with the child. Life pathways are still being fashioned. Far from a finished product, the child is going through a process which will determine what kind of adult he will become, whether and to what extent he will be capable of working and loving.

Three specific rights of the child flow from both common sense and from the law (ASFA.) These rights are basic to minimal health and to life. They are:

1. The right to safe surroundings.
2. The right to maintain significant relationships.
3. The right to a permanent home.

1. The right to safe surroundings

ASFA declares that the "health and safety" of the child are paramount, and that this consideration must dominate all others. The three basic rights listed above are an attempt to define the meaning of "health and safety." The right to safe surroundings is elemental and obvious.

Kulp (1993, p. 13) lists nine rights which she feels must be available to children if they are to have a chance to grow up to be loving and productive human beings. Preeminent among them is "the right to food, safety, supervision, and protection."

Children have the right to be free of abuse and neglect. The Division of Family and Children (DFC) is required to investigate physical abuse, sexual abuse and neglect. Of the three, neglect may well be the most devastating to the child, yet it is the area most neglected, perhaps because it is less easily defined. CPS workers must take neglect seriously, define it specifically, and investigate it thoroughly for the child's sake.

When the safety and health of the child are at stake, all voices must be fully heard. To protect the child, the DFC and the courts must have full knowledge. The legal parent, the CASA or guardian ad litem, and the foster parent must all be fully heard. They all need direct access to the court where important decisions about a child are to be made. The DFC must do its utmost to see that all parties are heard, both at case conferences and in court, even when there is disagreement.

The foster parent, acting in the child's best interest, has a duty of advocacy. Indiana foster parents have the legal right to notification of all hearings, to present written materials directly to the judge, and to speak out in court. Foster parents have the most day-to-day information about the child and may become the eventual permanent home. For foster parents,

especially when they have had the child for over one year, to remain silent whether from a lack of assertiveness or a fear of being blackballed, does the child a major disservice. If the foster parents feel that their voice is being ignored, they may want to hire an attorney and request the right to intervene as a full party in the court action. If the child's right to safe surroundings is to be taken seriously, then everyone who knows about those surroundings should have their full say.

2. *The right to maintain significant relationships*

Bonding is a significant attachment, not some "warm fuzzy" described by a well-meaning child advocate. Bonding is a significant reciprocal attachment which both parties want and expect to continue, and which is interrupted or terminated at considerable peril to the parties involved. Bonding may occur when, over a period of time, human beings share important events of daily life such as eating, sleeping and playing together. Bonding may be determined factually in four ways: by noting the length of time together, the behavior of the child, the reciprocity of the attachment, and family identification. See "What Attorneys Need To Know About Bonding" and "What Happens When Bonded Relationships Are Broken" by this author.) Bonding takes precedence over kinship. The most obvious adult example of this situation is marriage. The relationship between spouses is not genetic, yet it takes precedence over the family of origin and "blood" relatives. Few of us would accept the state telling us that when we go home tonight, we will have a new spouse, courtesy of the state. Yet this is what happens when we move a foster child, sometimes necessarily, but too often for trivial reasons.

Failure to recognize and honor bonding represents child abuse. Caseworkers in Indiana can avoid this possibility of abuse by reading and following their own DFC manual (Sec. 805.12) where bonding is well defined and considered a major factor in child placement. The DFC definitions of bonding focus on time spent together, the child's behavior, the adult commitment, and family identification. Ignoring such attachments can be devastating to the child.

Blood relatives are important. If and when the child is removed from the home of his legal parents, relatives who are available, acceptable, and willing to care for the child should be given priority. However, to locate blood relatives after time has passed and bonding with a foster family has occurred, and then to attempt to transfer the child to heretofore unknown relatives, "kin-come-lately," is irresponsible and harmful and wrong.

People are the medium through which our needs are met, and people are not interchangeable. Kulp (1993, p. 13) asserts the right of all children in care to "the preservation of significant relationships based on the child's needs." When a child has come to depend on a specific person to meet basic needs, the person and the needs become identical in the child's mind. To take away the person is to take away the secure feeling that basic needs will be met. While the argument might be made that the child will learn in time that others can meet those basic needs, there is risk that, rather than face future rejection, the child will turn his emotions off and refuse to attach again.

3. *The right to a permanent home*

Children need stability and permanence. A child cannot grow and change and develop without a firm and unchanging base. Even a less-than-best home is preferable to being shuffled around, never knowing where you belong. Children can adjust to almost any situation. They

cannot adjust to not knowing what happens next or not knowing where they will be tomorrow. One cannot get the momentum to spring forward from a moving base; one can only hang on and hope for stability.

One year in child's life is already a long time. Recognizing this as the maximum interlude allowable for impermanence, ASFA requires that a termination of parental rights be filed at that point. The choice between reunification with the legal parents or adoption must be made wisely but quickly. Delay abuses the child.

PERMANENT SOLUTIONS VS. PERMANENCY PLANS

Reunification and adoption are the only two permanent solutions. While ASFA allows for kin care and "permanent" legal guardianship as alternate permanency plans, they are not permanent solutions. Adoption is a lifetime promise, a forever commitment. Guardianships, on the other hand, can be easily dissolved.

Legal guardianship by relatives has been proffered as a preferable permanency plan over foster parent adoption, even when bonding to the foster parents has been demonstrated. Once again, blood is wrongly given preference over bonding, genetic ties considered more binding than a history of love and nurture and habits developed. The ideal of uniting or reuniting some element of the genetic family is presented as the ideological principle. Siblings and half-siblings are brought together for the first time. An out-of-state grandmother is resurrected. Great-aunts and uncles may be located, second and third cousins found. Bonding is ignored. And the child's chances for a permanent home with committed foster/adopt parents is bypassed in favor of the late-discovered blood relations.

Unfortunately, guardianship by relatives has become an easy way for some overworked caseworkers and welfare departments to shirk responsibility for the careful evaluation of the long-term well-being of the child. Children need to be raised by someone who is crazy about them, not someone who may take them out of a sense of duty. Pushing a relative to take a child, however subtle the push, creates a reluctant careperson, hardly an ideal home for the child. A loving foster home on an adoption track is certainly preferable to a reluctant aunt or grandmother who has had little or no contact with the child. A family wanting to adopt where the child has spent a significant amount of time and has bonded should be the automatic choice. The commitment and promise of lifelong loyalty that is explicit and public in adoption is more compelling than a blood tie alone.

When blood relatives want to adopt a child in wardship, their home should be treated like any other adoptive home. Potential adoptive relatives should receive the same careful home study and scrutiny as other candidates to adopt.

Children become adults. Children who are neither reunified nor adopted are emancipated to independent living. Perhaps they have been taught independent living skills like finding a job and cooking and balancing a checkbook. They still have no place to go, no place to call home, no one who cares deeply, no one to contact when things go very well or very badly, no inheritance to look forward to. No wonder emancipated foster children end up poor and homeless in disproportionately large numbers. Emancipation to independent living without a permanent home is a cruel joke.

CONCURRENT PLANNING

A permanent home is so important to a child and later on to the adult that all permanency options should be considered from the very beginning. ASFA calls this “concurrent planning” and urges that such be done. Concurrent planning is nothing more than contingency planning, finding alternative second or third plans in the event that the primary plan does not work out. We do this for all important matters. We even schedule alternatives for outdoor activities in the case of rain. We ought to do at least that much for our children.

One simple way to make a contingency plan is to identify foster homes in three categories: purely temporary homes with no intention of adopting; pre-adoptive homes with high interest in adopting; and undecided homes which are open to both possibilities. Where reunification seems unlikely, the child can be placed from the start in a foster home where interest in adoption is high, thus keeping moves to a minimum.

Some have argued that the foster/adoptive parents would have a conflict of interest, and in their bias would work against reunification. While possible, this position underestimates most foster parents. Foster parents are often willing to adopt the “child that nobody else wants.” In so doing, they are adopting, not to fulfill some personal need to parent, but to help a child already off to a bad start in life. Such parents are fully capable of working hard to reunify a child with his legal parents, and failing that, to be willing to raise the child as their own. In any case, when one hopes that every move is the last move for a foster child, the notion of concurrent planning makes good sense. Any problems of conflict of interest are more than balanced by the danger inherent in multiple moves and disrupting bonded relationships.

Others, particularly private licensed child placing agencies, have argued that some children are not adoptable. This argument also underestimates the good will and caring of many foster parents. In Indiana foster parents adopt 70 percent of the foster children who are adopted. Foster parents have adopted teens with multiple physical disabilities and those with severe behavioral problems, as well as children with AIDS. To find permanent homes for some children may take hard work, and the creativity to look outside conventional areas for recruitment of adoptive families, but to emancipate a child at 18 or 21 without a permanent home is to fail the child.

EMANCIPATION TO INDEPENDENT LIVING: THE CHILD CAST ADRIFT

Private child placing agencies have a vested financial interest in maintaining long-term foster care. Fanshel et al (1989) report on the importance of making agency resources available for the “long-term care of the most difficult (and essentially homeless) children in the foster care population.” Nowhere in the article is mention made that a permanent home through adoption would negate homelessness and make lifelong resources available to the child.

Too often agency interests result in the emancipation of children at age 18 to “independent living” without a permanent home. Courtney et al (1998a) in a study of Wisconsin foster children, report that 41 percent of all their emancipated respondents wished that they had been adopted. This is surprisingly high, considering that most young adults between 18 and 21 place a high value on freedom from family ties. Apparently, the young adults are quick to appreciate that they have been set adrift without a boat.

Problems come quickly for foster children emancipated without a permanent home. Courtney et al (1998b) report on outcomes 12 to 18 months after leaving out-of-home care.

- Education: Although 79 percent of pre-emancipated youngsters spoke of attending a college, a follow-up study revealed that 37 percent had not finished high school.
- Preparedness: Approximately 30 percent reported a lack of preparation in more than one major life skill area.
- Securing stable housing: Thirty-seven percent had obtained a room of their own. Twenty-two percent had lived in four or more places in their short interlude since emancipation. Twelve percent were homeless.
- Employment: Sixty-one percent were employed. The average wage for Caucasians was \$202 per week, for African-Americans, \$182.
- Medical care: Forty-four percent reported medical problems without adequate treatment.
- Crises: Many reported crises with incarceration, homelessness, victimization, and unemployment.

Courtney et al (1998b) conclude by noting that the transition to independent adult life is very difficult for these children. They fail, however, to note the obvious: that both the transition and the future adjustment might have been greatly facilitated if a concerted and successful effort had been made to establish a permanent home.

Finally, the child of 14 has the legal right to say whether he wishes to be adopted or not. Many 14-year-olds are so enamored of the possibility of freedom from adult controls and rules and so cockily ignorant of what it means to be on one's own and alone that they reject any adoption. The 14-year-old needs to understand that he will have his legal freedom at 18 whether he is adopted or not. Without a permanent home, however, he will have no fail-safe option as a young adult. The child welfare and court systems also need to look beyond the young person's declared wish. They must consider the child's lifelong best interest, with the young person's wish as one factor, but not the only factor, in the evaluation.

Emancipation to independent living represents a failure of the system to provide the child with one of his basic rights, a permanent home. States and counties need to keep records on the number of foster children emancipated to independent living. By documenting our failures we might all work more diligently to increase the number of permanent solutions for the children in our care.

The National Commission on Family Foster Care (1991, p. 5) recognizes the right of children and youth to realize "a family intended to be permanent." They say:

The premise of permanency is that children and youths have the need and the right to grow up in a legally recognized family that intends to provide long-term, consistent, nurturing and safety and lifetime relationships. In all cases in which children and youths have been separated from their parents through child protection intervention, PL 96-272 requires that reasonable efforts be made to reunite children and parents, or an alternative permanent plan, such as adoption, should be sought.

Chestang et al (1993) summarize a philosophy underlying various methods of reducing time spent in foster care:

1. Every child has a right to a permanent home.
2. Foster care is a temporary arrangement, not a solution.
3. Extended foster care with its vicissitudes is damaging to children.
4. Only two roads to permanence exist for the child: rehabilitating his natural parents or family or helping them to free him for adoption.
5. Inactivity on the part of the caseworker and/or the child's parents perpetuates the state of extended foster care.
6. Adoption is a realistic alternative for the older child.

Hughes (1997) quotes the American Orthophychiatric Association and the American Psychiatric Association: "There is a consensus that children need and have a right to a stable and permanent home, and that a child's own home and parents are best." Hughes goes on to add that if this is not possible, the child needs to be freed for adoption.

CONCLUSIONS

1. **One year is a long time in the life of a child.** ASFA's guidelines to achieve permanence within "child time" are critical and should be followed.
2. **Foster care is, or should be, temporary.** Foster care must not be allowed to become a way of life.
3. **Bonding takes precedence over kinship.** Strong relationships and potential lifetime commitments are more valuable to the child than are blood ties. The marriage bond is one good example of the precedence of bonding over kinship.
4. **Reunification and adoption are the only permanent solutions.** While ASFA allows for kinship care and "permanent" legal guardianship as alternate permanency plans, they are not permanent solutions.
5. **Children have the right to a permanent home.** The primary consideration must not be the right of the adults but the rights of the child. As ASFA makes clear, the child's rights are paramount.

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